

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF HUMAN SERVICES

In the Matter of the Temporary Immediate
Suspension of the Family Child Care
License of Amy Benck

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION**

This matter came before Administrative Law Judge James Mortenson on April 30, 2014, for an evidentiary hearing. The hearing was held in a courtroom at the Security Building, 201 Lake Avenue, Fairmont, Minnesota. The hearing record closed on April 30, 2014, following the conclusion of the hearing.

Troy Timmerman, Faribault County Attorney, appeared for Human Services of Faribault and Martin Counties (Agency) and the Minnesota Department of Human Services (Department). Joseph Gangi, Farrish Johnson Law Office, Chtd., appeared for Amy Benck (Licensee).

Each party had two witnesses testify. Jennifer Harris, parent of the injured child, and Camela Moore, Licensors for Human Services of Faribault and Martin Counties, testified credibly for the Department. The Licensee testified credibly for herself. Maureen Cordova, a parent with children in the Licensee's day care, testified credibly for the Licensee. Three exhibits were entered into the record.¹

STATEMENT OF THE ISSUE

Whether the temporary immediate suspension (TIS) of Amy Benck's family child care license should remain in effect pending the completion of the investigation and issuance of the Commissioner's final order, if any, on a licensing sanction?

SUMMARY OF RECOMMENDATION

The Administrative Law Judge concludes that the Department did not demonstrate reasonable cause to believe that the Licensee's alleged actions or failure to comply with applicable law or rule pose an imminent risk of harm to the safety of persons served by the program.

¹ See Appendix A, List of Exhibits.

Based upon the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Licensee operates a family day care from her home in Fairmont, Minnesota.²

2. The Licensee holds a Family Child Care License, Number 1051869R02, and has been licensed for over seven years.³

3. On Wednesday, February 19, 2014, A.H., born August 25, 2013 to Jennifer and Jason Harris, was brought to the Licensee's day care by her mother at 6:45 a.m.⁴ A.H. was fussy and had been fussy the day before at the day care.⁵ The Licensee informed Ms. Harris on February 18, 2014, that she suspected A.H. was teething.⁶ Although she was fussy, A.H. did not appear injured when her mother dropped her off at day care on February 19, 2014.⁷

4. Because of her fussiness and crying on February 19, 2014 at the day care, the Licensee held A.H. for much of the day while the child was in her care.⁸ During the morning A.H. was sitting on the floor next to another child with the Licensee and she fell forward.⁹ A.H. hit her head on a toy the other child was playing with, leaving a red mark on her face.¹⁰ A.H. did not rest much on February 19, 2014, and refused her afternoon bottle because she was so inconsolable.¹¹ Licensee did not notice a problem with A.H.'s arm.¹²

5. A.H. spent eight hours per day at day care when she was there.¹³ Jason Harris picked up A.H. from day care on February 19, 2014.¹⁴ A.H. was fussy when her father came to pick her up and fell asleep in her car seat.¹⁵ A.H. resumed her fussiness while in her father's care, crying all through her bath.¹⁶

² Testimony (Test.) of Amy Benck, Exhibit (Ex.) 2.

³ Test. of A. Benck, Ex. 2.

⁴ Test. of Jennifer Harris; Test. of A. Benck.

⁵ Test. of A. Benck.

⁶ Test. of J. Harris.

⁷ Test. of J. Harris; Test. of A. Benck.

⁸ Test. of A. Benck.

⁹ Test. of A. Benck.

¹⁰ Test. of A. Benck.

¹¹ Test. of A. Benck.

¹² Test. of A. Benck; Test. of J. Harris; Test. of C. Moore.

¹³ Test. of J. Harris.

¹⁴ Test. of J. Harris.

¹⁵ Test. of J. Harris.

¹⁶ Test. of J. Harris.

6. At 7:45 p.m. on February 19, 2014, Ms. Harris returned home from her job as a nurse at the local hospital.¹⁷ Ms. Harris nursed A.H. and then laid her in bed.¹⁸ Ms. Harris then noticed A.H.'s arm was limp at her side, which was unusual.¹⁹

7. On the morning of Thursday, February 20, 2014, Ms. Harris noticed that A.H.'s arm hung at her side and that A.H. screamed whenever Ms. Harris moved the arm.²⁰ Ms. Harris immediately took A.H. to the doctor where an x-ray of her left arm was taken.²¹ The examining doctor suspected the arm was fractured.²² The diagnosis was confirmed on Friday, February 21, 2014, after an orthopedic doctor reviewed the x-ray.²³ A.H.'s arm was then placed in a cast.²⁴

8. On or about February 20, 2014, the Licensee contacted Camela Moore, Day Care Licenser for the Agency, and informed Ms. Moore that Ms. Harris had called the Licensee, concerned that A.H.'s arm had been broken while at the day care.²⁵ The Licensee did not see anything happen to A.H. on February 19, 2014, to indicate her arm was broken.²⁶ No reports or allegations regarding the Licensee's day care had yet been filed with the Agency.²⁷

9. A report of "Suspected Abuse and Neglect – Child" was completed by Dr. Jeffrey Green on February 26, 2014, which noted A.H.'s broken left arm.²⁸ The report was based on Ms. Harris' report and the x-ray of the child's arm.²⁹ The report notes that it was possible the injury occurred at "day care."³⁰

10. An investigation of possible physical abuse was conducted by the Agency, including Ms. Moore, sometime between February 20, 2014 and March 24, 2014.³¹ The Agency only investigated the day care facility.³² The investigation consisted of questioning the Licensee, who advised the Agency that while A.H. had been fussy, she did not know how the broken arm occurred.³³

11. As a result of its maltreatment investigation the Agency determined that while "physical abuse of [A.H.] was unable to be determined," the evidence "does

¹⁷ Test. of J. Harris.

¹⁸ Test. of J. Harris.

¹⁹ Test. of J. Harris.

²⁰ Test. of J. Harris.

²¹ Test. of J. Harris.

²² Test. of J. Harris.

²³ Test. of J. Harris.

²⁴ Test. of J. Harris.

²⁵ Test. of J. Harris; Test. C. Moore.

²⁶ Test. of J. Harris; Test. A. Benck; Test. C. Moore.

²⁷ Test, C. Moore.

²⁸ Ex. 1.

²⁹ Ex. 1.

³⁰ Ex. 1.

³¹ Test. C. Moore; Ex. 3.

³² Test. C. Moore; Ex. 3.

³³ Test. C. Moore.

suggest” that the Licensee “was unable to provide appropriate supervision to [A.H.] and possibly the other children that were attending her day care at the time of the incident.”³⁴ The unspecified “evidence” led the Agency to conclude that “neglect” of A.H. occurred at the day care.³⁵ The Agency assumed the injury happened at day care.³⁶

12. The results of the investigation were forwarded to Ms. Moore, who subsequently issued an Order for TIS on March 28, 2014.³⁷ The basis for the TIS was that the Licensee could not explain how A.H.’s injury happened.³⁸ The Agency thus concluded that the Licensee failed to provide adequate supervision at her day care.³⁹ Ms. Moore concluded that A.H.’s arm was broken when her father picked her up from day care, and this was based on the maltreatment investigation.⁴⁰

Based upon these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Administrative Law Judge and the Commissioner of Human Services have jurisdiction over this matter pursuant to Minn. Stat. §§ 14.50 and 245A.07.

2. The Agency and the Department have complied with all of the substantive and procedural requirements of law and rule.

3. The Commissioner shall impose a temporary immediate suspension of a child care license “[i]f the license holder’s actions or failure to comply with applicable law or rule, or the actions of other individuals or conditions in the program pose an imminent risk of harm to the health, safety, or rights of persons served by the program[.]”⁴¹

4. A temporary immediate suspension shall “remain in effect pending the Commissioner’s final order under section 245A.08, regarding a licensing sanction issued under subdivision 3 following the immediate suspension” if the Commissioner demonstrates “that reasonable cause exists to believe that the license holder’s actions or failure to comply with applicable law or rule poses . . . an imminent risk of harm to the health, safety, or rights of persons served by the program.”⁴²

5. “Reasonable cause” means that there are specific articulable facts or circumstances which provide the Commissioner with a reasonable suspicion that there is an imminent risk of harm to the health, safety, or rights of persons served by the

³⁴ Ex. 3.

³⁵ Ex. 3.

³⁶ Test. of C. Moore; Exs. 1, 2, 3.

³⁷ Test. C. Moore; Exs. 2 and 3.

³⁸ Test. of C. Moore.

³⁹ Test. of C. Moore.

⁴⁰ Test. of C. Moore.

⁴¹ Minn. Stat. § 245A.07, subd. 2.

⁴² Minn. Stat. § 245A.07, subd. 2a(a).

program.⁴³ Speculation is “not sufficient for a reasonable belief that an imminent risk exists.”⁴⁴

6. The Department has failed to show reasonable cause exists to believe that there is an imminent risk of harm to the health, safety, or rights of the children in the Licensee’s day care because the Department has failed to show the Licensee has violated any law or that the injured child was injured while in the Licensee’s care.

Based upon the Findings of Fact, Conclusions of Law, record, and the Memorandum below, the Administrative Law Judge makes the following:

RECOMMENDATION

The Administrative Law Judge respectfully recommends that the Order for Temporary Immediate Suspension of the Family Child Care License of Amy Benck (Number 1051869R02) be **RESCINDED**.

Dated: May 13, 2014

s/James Mortenson

JAMES MORTENSON
Administrative Law Judge

Reported: Digitally recorded.

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Human Services (the Commissioner) will make the final decision after a review of the record. The Commissioner may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendations. The parties have 10 calendar days after receiving this Report to file Exceptions to the Report. At the end of the exceptions period, the record will close. The Commissioner then has 10 working days to issue her final decision. Parties should contact Debra Schumacher, Administrative Law Attorney, P.O. Box 64998, St. Paul, MN 55164, (651) 431-4319, to learn the procedure for filing exceptions or presenting argument.

Under Minn. Stat. § 14.62, subd. 1, the Agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

⁴³ *Id.*

⁴⁴ *In re Temp. Immediate Suspension of Family Child Care License of Strecker*, 777 N.W.2d 41, 47 (Minn. Ct. App. 2010)

MEMORANDUM

This matter is based on the assumption that the child was injured while at the Licensee's day care. A preponderance of the evidence does not demonstrate that this was the case.

The evidence shows that the child, a six-month-old infant, was not injured when she was dropped off at the Licensee's day care on February 19, 2014. The child was fussy all day. She required and was provided the Licensee's constant attention. The evidence does not demonstrate that the infant was injured when her father picked her up eight hours later. The evidence shows that the infant was injured when her mother put her to bed sometime after she returned from work at 7:45 p.m.

The Agency investigation into the matter focused on the time the infant was at day care. The only evidence regarding the time the infant left the day care until her mother nursed her and put her to bed was the mother's testimony that the child was fussy when her father bathed her. Despite these facts, the Agency makes the assumption that the infant was injured at day care, not after she was picked up by her father. The evidence presented at hearing does not show the infant was injured when she was picked up from day care. Her father took her and she calmed down and went to sleep in her car seat. Her mother did not report the child was injured when father picked her up. The father did not testify as to how the child was under his care. Indeed, he did not testify at all. The only evidence regarding the maltreatment investigation, upon which the TIS was based, was from Ms. Moore who testified that the investigation consisted of talking to the Licensee about her supervision of the infant on the day the mother asserted A.H.'s arm was broken. The investigators were dissatisfied that the Licensee could not explain how the arm was broken. Yet there is no evidence of an investigation into the child's care during the significant portion of the remainder of her day.

The Agency's conclusion that the Licensee must have failed to adequately supervise the infant because she could not explain how the infant was injured is not substantiated by the evidence. Based on the evidence in the record, the Licensee could not explain how the infant was injured because the infant was injured after she left the Licensee's care. Without evidence to support an allegation that the child was injured while in the Licensee's care, the Department lacks reasonable cause to believe there is imminent risk of harm to any of the children in Licensee's care. The mere speculation that the injury could have happened at the day care is not sufficient. The evidence in the record, however, removes any speculation that the Agency might have had when the order was initially issued. Thus, it is respectfully recommended that the Order for TIS be rescinded.

J. R. M.

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APPENDIX A – Exhibits

- 1) Suspected Abuse and Neglect - Child [Report], February 26, 2014.
- 2) Order of Temporary Immediate Suspension, March 28, 2014.
- 3) Letter to Benck, March 24, 2014.